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(4)

No. 01-653

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. and NEXTWAVE POWER PARTNERS INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Urban Comm-North Carolina, Inc. ("UC-NC") respectfully moves pursuant to Rule 37.2 of the Court for leave to file the accompanying brief as *amicus curiae* in support of Respondents herein, NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"). The Solicitor General, attorney for Petitioner, the Federal Communications Commission ("the Commission"), has consented to the filing of an *amicus curiae* brief by UC-NC, and his letter of consent has been lodged with the Court. UC-NC has requested but not received the consent of NextWave to the filing of the brief.

As explained more fully in the attached brief under "Interest of *Amicus Curiae*," UC-NC has a critical interest in seeing the petition of the Commission for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit ("the Petition") denied inasmuch as UC-NC stands in the same position vis-a-vis the Commission as NextWave. Like NextWave, UC-NC was granted broadband personal communication services ("PCS") spectrum licenses auctioned by the Commission but was, as were NextWave and other licensees, subsequently forced to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code") due to actions by the Commission that made it impossible for it to raise the capital needed to pay for the licenses and put them to use. As was the case with the licenses of NextWave and other PCS spectrum licensees in reorganization, the Commission declared UC-NC's licenses cancelled and re-auctioned them.

While the Commission proceeded, after considerable delay, to consider and deny NextWave's petition for reconsideration of its cancellation of NextWave's licenses, freeing NextWave to appeal the Commission's action to the United States Court of Appeals for the District of Columbia Circuit, have the re-auction decision reversed and receive back its licenses, the Commission has so far refused to decide UC-NC's parallel petition for reconsideration of the cancellation of UC-NC's licenses. Thus, while it is urgent for NextWave to bring an end to this litigation at the earliest date, it is even more urgent, and vital, for UC-NC, and any other small companies in the same position, whose licenses have not yet been restored, that the decision reversing the Commission's cancellation of the licenses be made final by denial of the Petition.

In the accompanying *amicus* brief, UC-NC argues that (1) when a regulatory agency undertakes to engage in arms-length commercial transactions with non-governmental entities, it is subject to the same laws as any other entity engaged in commercial transactions, including the Bankruptcy Code; and (2) no regulatory purpose was served by the Commission's attempted cancellation of the licenses.

WHEREFORE, UC-NC asks that the Court permit UC-NC to submit the accompanying *amicus curiae* brief in support of Respondents.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), has a special interest in seeing the petition ("the Petition") of the Federal Communications Commission ("the Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") denied. UC-NC, just as Respondents herein, NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"), is a start-up company which qualified for special financing as a "small business" under the statute and rules governing the auction of spectrum by the Commission. Like NextWave, UC-NC obtained from the Commission at auction[2] broadband

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1. The Solicitor General, attorney for Petitioner, has given his consent to the filing of this brief and, in compliance with Supreme Court Rule 37.2, his letter of consent has been lodged with the Court. *Amicus* has sought but not obtained the consent of Respondents to the filing of the brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. In May of 1996, after 184 rounds of bids, Urban Communicators P.C.S. Limited Partnership ("UCPCS"), the parent of UC-NC's parent, Urban Comm-Mid-Atlantic, Inc., Debtors-in-Possession, was the high bidder at a Commission auction for the right to apply for C Block licenses within ten basic trading areas ("BTAs") in North Carolina. UCPCS's bids, which totaled $74.6 million, were consistent in amount with bids for licenses in similar BTAs throughout the country. UCPCS assigned its C Block license application to UC-NC. The Commission conditionally granted the licenses to UC-NC, which made the required down payment and later executed notes payable to the Commission in the amount of the then outstanding balance.

personal communication services ("PCS") C Block spectrum licenses, and like NextWave, UC-NC was foreclosed due to action taken by the Commission after conclusion of the auction from raising the capital necessary to meet its construction costs and its payment obligations to the Commission, therefore finding it necessary to seek the protection of Chapter 11 ("Chapter 11") of Title 11 of the United States Code ("the Bankruptcy Code").[3] Thereafter, the Commission declared cancelled and scheduled for re-auction first NextWave's and later UC-NC's licenses, as well as those of other small-business licensees, for failure to pay the debts due the Commission.

NextWave and UC-NC both filed petitions with the Commission for reconsideration of the respective cancellation and re-auction notices. The Commission denied NextWave's petition within seven months, enabling NextWave to appeal to the Court of Appeals, which reversed in the decision from which the Commission seeks leave to appeal herein. The Commission, however, has not, fifteen months after the filing of UC-NC's petition for reconsideration and seven months after the Court of Appeals' reversal of the Commission's determination that NextWave's licenses had been cancelled, decided UC-NC's petition for reconsideration,[4] even though under the Court of Appeals' decision in the NextWave action the Commission has no

3. 11 U.S.C. § 101, *et seq.*, as amended.

4. After the Court of Appeals' reversal of the Commission's decision, UC-NC wrote the Commission and its members pointing out the applicability of the NextWave decision to the UC-NC petition and asking that the Commission expedite consideration and grant UC-NC's petition for reconsideration.

choice but to restore those licenses to UC-NC.[5] UC-NC's appeal to the Court of Appeals from the order scheduling UC-NC's license for re-auction was dismissed as incurably premature by the Court of Appeals because of the pendency of UC-NC's petition for reconsideration.[6] Thus, while NextWave has received back its licenses and is able to obtain funds and proceed to build out a system, UC-NC is still without its licenses, with the result that UC-NC is unable to give the assurances it must give to potential investors in order to attract the necessary capital.

The Commission itself has recognized that "[i]n the fast-evolving wireless market, an indeterminate delay to await the final outcome of litigation might be a significant, or

5. It is quite clear that the Commission intends to delay consideration of UC-NC's petition for reconsideration pending proceedings in this Court. The Commission bent every effort to avoid or postpone the restoration of NextWave's licenses, even to the point of asking the Court of Appeals to postpone, pending the Petition, the issuance of the mandate in the NextWave action. The Court of Appeals denied the Commission's request, finding that the Commission did not demonstrate that the Petition "would present a substantial question" and noting that NextWave stipulated to make its plan of reorganization contingent upon a final decision from this Court. *NextWave Pers. Communications Inc. v. FCC*, Nos. 00-1402 & 00-1403, 2001 U.S. App. LEXIS 19617, *4 (D.C. Cir. Aug. 23, 2001).

6. *See Urban Comm-North Carolina, Inc. v. FCC*, No. 00-1430, 2000 WL 1946634 (D.C. Cir. Dec. 4, 2000). After the NextWave decision, UC-NC filed in the Court of Appeals a petition for mandamus directing the Commission to decide UC-NC's petition for reconsideration. That petition is pending. *See* Petition for Writ of Mandamus, *In re Urban Comm-North Carolina, Inc.*, No. 01-1490 (D.C. Cir. filed Nov. 13, 2001).

even crucial blow to future licensees' ability to compete."[7] The NextWave bankruptcy court, referring to this and similar utterances by the Commission, expressed the view it was "self-evident that the same assertion applies equally to in essence a start-up company such as the debtor's which were [*sic*] organized to take advantage of the legislation resulting in the C&FY auctions" and that "there can be no question of the very, very real danger of potential harm to the debtors" flowing from the indefinite delay.[8]

It is likely that, just as NextWave was able to file a second reorganization plan and announce significant outside financing once its C Block licenses were restored, UC-NC will also be able to take advantage of the limited capital funding presently available *if* UC-NC is able to approach the capital markets now, without further delay and with a clear right to the UC-NC Licenses. Denial of the Petition will aid UC-NC in doing so. If the Petition is granted, the resulting delay may foreclose UC-NC from the capital markets forever, considering the continually dimming prospects for the economy and the increased capital needs of larger, more established carriers in the near future.

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7. Opposition by the Federal Communications Commission to NextWave's Motion for a Stay Pending Judicial Review or for Expedited Consideration at 19, *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001) (Nos. 00-1402 & 00-1403).

8. Transcript of Motion for Order Approving Grant at 31-32, *In re NextWave Pers. Communications, Inc.*, Ch. 11 Case No. 98 B 21529 (ASH) (Bankr. S.D.N.Y. hearing held on Sept. 5, 2001) (Adlai S. Hardin, Jr., J.).

SUMMARY OF ARGUMENT

The issue framed in the lower court is whether the Commission was precluded from cancelling NextWave's licenses by Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), which prohibits a governmental unit from revoking a license of a debtor solely because the debtor has not paid a debt dischargeable in the case under the Bankruptcy Code. In the face of that prohibition, the Commission seeks to enforce the language in the license documents conditioning the licenses upon full and timely payment of all monies due and providing for automatic cancellation of the licenses in default of such payment. Petition at 5. It is the Commission's claim that the Court of Appeals' decision nullifying the cancellations under Section 525 of the Bankruptcy Act "dramatically expands the reach of bankruptcy law into an area that Congress has traditionally reserved to the Commission and needlessly transforms Section 525 into an impediment to the regulatory objectives established by Section 309(j)" of Title VII of the United States Code. *Id.* at 13. The Commission also argued below and continues in the Petition to argue that it cancelled the licenses, not "solely" (Section 525(a)) because NextWave did not pay its debt to the Commission, but also because the requirement of full payment for the licenses was an element of the regulatory function the Commission performed in auctioning licenses. *Id.* at 24.

The Court of Appeals held that Section 525 prevented the Commission, whatever its motive — regulatory or not — from cancelling the licenses of winning bidders on the ground that they had failed to make timely installment payments while in Chapter 11. UC-NC submits that the Court of Appeals' holding is a simple application of clear language

of the statute not in need of review by this Court anchored, as it is, in the sound principle that when a regulatory agency undertakes to engage in arms-length commercial transactions with non-governmental entities, it is subject to the same laws as any other entity engaged in commercial transactions, including the Bankruptcy Code. *See* **Point I**, *infra*. In any event, no regulatory purpose was served by the Commission's attempt to cancel the licenses. *See* **Point II**, *infra*.

ARGUMENT

I. Having Assumed the Roles of Seller and Creditor, the Commission Must Act in Those Roles

In selling licenses at their full commercial value and structuring the sale as a typical commercial transaction, the Commission placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. The Commission, by design, adopted the form and substance of an ordinary commercial financed sale. The Commission's actions as a commercial lender give rise to the same set of concerns as other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process and the need to provide both for the preservation of financially embarrassed but economically viable enterprises and for the protection of *all* their creditors and investors. The Bankruptcy Code provides those protections.

By entering the commercial arena and requiring licensees such as NextWave and UC-NC to pay full commercial value for the PCS licenses and then financing that acquisition, the Commission subordinated itself to the contract and other

laws that regulate the affairs of commercial transactions. The Commission could not responsibly or reasonably have determined that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction — of which the bankruptcy laws is one. The other participants in the transaction could reasonably expect that the Commission would do so. There is no exemption from the application of the Bankruptcy Code for the government. That is true in all cases[9], and certainly in the instant case, in which the Commission's actions in cancelling licenses is directly addressed by Section 525's prohibition.[10]

9. Section 101(10) of the Bankruptcy Code defines "creditor" to include "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). "[T]he United States is a creditor [within that definition] not only with respect to public exactions for revenue purposes such as income taxes, but also with respect to statutory obligations enforceable by a federal administrative agency in the public interest for the benefit of private parties." 2 *Collier on Bankruptcy* ¶ 101.10 (Lawrence P. King ed., 15th ed. rev. 2001) (footnote omitted). *See In re Anderson*, 279 F. 525, 529 (2d Cir. 1922) (United States foreclosed from collecting tax from bankrupt estate, having failed to file proof of claim; "[t]he United States must file its claim for taxes as any other creditor, if it desires to share in the estate"); *In re Ward*, 131 F. Supp. 387, 395 (D. Colo. 1955) ("[t]he present Act, except as it awards a status of priority, puts the United States in no better position than any other claimant"); *cf. In re Minot Auto Co., Inc.*, 298 F. 853, 856-857 (8th Cir. 1924) (United States bound by provisions of the Bankruptcy Law of 1898).

10. In arguing that payment for the licenses served a regulatory as well as a financial function, the Commisssion refers to the licensees' failure to pay as a breach of a fundamental regulatory (Cont'd)

II. No Regulatory Purpose Was Served by the Commission's Attempted Cancellation of the Licenses

Even if one were to accept the Commission's argument that a "regulatory purpose" behind the cancellations for non-payment could exempt the cancellations from the reach of Section 525, the Court of Appeals' decision would remain sound and not in need of review by this Court. It is clear from the undisputed facts that no regulatory purpose was in fact served by the cancellations.

After the initial auction of the C Block licenses was concluded in May 1996 and the high bidders announced, but before the licenses were issued by the Commission and financing could be obtained, the Commission in June 1996

(Cont'd)

condition of the licenses. "The bids were required and collected not for their own sake," the Commission argues, "but rather because they are the means by which the Commission ensures that the prospective licensee will best use the license in the public interest." Petition at 24. But to say that the licensees' failure to pay the debt interfered with the Commission's regulatory purpose is not to say that the Commission had a reason apart from non-payment of the debt for cancelling the license; it is merely to say that the Commission attached great importance to the failure to pay. The statute, however, does not weigh the importance to the creditor agency of the licensee's failure to pay but in unequivocal language provides that the licensee's failure to pay may not serve as the excuse for cancellation of the license. All licenses issued by governmental entities are issued in pursuance of a regulatory scheme, and the requirement of payment for a license is part of that scheme. If the Commission's argument were to be accepted, the prohibition against the cancellation of the license for payment of a non-dischargeable debt would be meaningless. There is no need for review by this Court of the application by the Court of Appeals of this obvious truism.

announced that it would auction three blocks of spectrum (the D, E and F Blocks) in the same BTAs as, and competing with, the C Block licenses.[11]

The ensuing auctions for additional licenses of PCS spectrum, commencing in August 1996 and ending in January 1997,[12] flooded the market for PCS spectrum and drove down the value of PCS licenses. While the successful bids for C Block licenses had averaged $1.33 per MHz-Pop[13] in the main auction ending May 6, 1996, and $1.94 per MHz-Pop in a re-auction in July 1996, the average of the high bids for the new licenses in the same BTAs for which C Block licenses

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11. *See FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.)*, 200 F.3d 43, 47 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

12. *See NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.)*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

13. $/MHz-Pop is a generally accepted industry measurement standard. *See NextWave*, 200 F.3d at 47.

> The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. . . . One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

Id. at 47 n.4

were granted was only $.33 per MHz-Pop[14]. This difference in the bids in identical markets demonstrates that the Commission, by auctioning additional PCS spectrum immediately after the C Block auctions closed, had drastically depressed the market value of all such licenses. Predictably, the C Block licensees found that, in light of the disparate values placed on equivalent PCS spectrum licenses, financing for the licenses and the build-out of their PCS systems could not be obtained. In the words of United States Bankruptcy Judge Adlai S. Hardin, Jr.,

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date [May 1999], nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the Commission have been placed in service.[15]

The Commission, recognizing its error, decreed a payment moratorium in order to determine how to remedy the situation it had created. After the expiration of the payment moratorium, however, the Commission decided to insist upon full payment of auction bids for any licenses the license holders chose to keep.[16] The licenses for which the holders, for the reasons mentioned above, were unable to make full and timely payment (a significant portion of those awarded) were scheduled by the Commission for re-auction.

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14. *NextWave*, 235 B.R. at 284.

15. *Id.* at 286.

16. Petition at 6-7.

Notwithstanding the Commission's strenuous argument that the defaulting licensee's failure to pay the installments when due demonstrates their unsuitability as C Block licensees, the plain fact is that the inability of NextWave and those standing in the same position as NextWave to pay the bid prices for the licenses had nothing to do with their potential efficiency in utilization of the licenses but had everything to do with the Commission's conduct subsequent to the original C Block auctions. The C Block licensees failed to raise the necessary financing because the Commission had not been sensitive to the needs of the winning bidders to go into the public markets to raise the necessary capital, a fact inherent in the very criteria by which they were chosen.

When it auctioned the C Block licenses to minimally capitalized start-up companies and allowed for installment financing of the winning bids, the Commission knew or should have known that, by definition, the ability of the winning bidders to pay (*i.e.*, raise the necessary capital in a competitive capital market) would wax and wane with the volatile market for public financing. Nonetheless, the Commission proceeded to conduct subsequent auctions of PCS spectrum with complete disregard of that fact and scheduled subsequent auctions in a manner that virtually assured that the C Block bidders would be unable to raise the necessary capital. The inability to raise the necessary capital would have been the likely experience of any small business meeting the eligibility criteria for the C Block licenses and was, in fact, the experience of virtually all of those who did bid successfully. It is not in keeping with the facts, then, for the Commission to argue that the Court of Appeals' decision "transfers the licenses to entities that value the spectrum less highly." Petition at 13. It was the market that valued the spectrum less highly, and it did so because of the devaluation the spectrum had suffered as a direct consequence of the Commission's actions.

The Commission understands full well that the arguments it has advanced in its litigation with C Block licensees do not hold up. It has lobbied Congress extensively during the pendency of this litigation to obtain the exception from the Bankruptcy Code for its actions as a commercial lender that it claims to possess already and has sought retroactive application of the statute it has proposed for the purpose[17] in

17. [Proposed] SEC. 618. Section 309(j)(8) of the Communications Act of 1934 is amended by adding new paragraph (D) as follows:

(D) PROTECTION OF INTERESTS. —

(i) Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships, or any succeeding Federal law not expressly in derogation of this subsection, shall not apply to or be construed to apply to the Commission or limit the rights, powers, or duties of the Commission with respect to (a) a license or permit issued by the commission under the subsection or a payment made to or a debt or other obligation owed to the Commission relating to or rising from such a license or permit, (b) an interest of the Commission in property securing such a debt or other obligation, or (c) an act by the Commission to issue, deny, cancel, or transfer control of such a license or permit.

(ii) Notwithstanding otherwise applicable law the Commission shall be deemed to have a perfected, first priority security interest in a license or construction permit issued by the Commission under this subsection and the proceeds of such a license or permit for which a debtor or other obligation is owed to the commission under this Subsection.

(Cont'd)

order to nullify the actions brought by C Block licensees. On each occasion, Congress refused to grant the exception the Commission sought.[18]

(Cont'd)

(iii) This paragraph shall apply retroactively, including to pending cases and proceedings whether on appeal or otherwise.

S. 1217, 106th Cong. § 618 (1999).

18. The proposed amendment (footnote 16, *supra*) was included in S. 1217, a fiscal year 2000 appropriation bill for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, which was passed by the Senate on July 22, 1999. *See* 145 Cong. Rec. S9068 (July 22, 1999). Under unanimous-consent agreement, S. 1217 was not engrossed but ordered to be held until the House companion measure, H.R. 2670, was received, and once received H.R. 2670 was to be amended by striking everything after the enacting clause and inserting S. 1217 in lieu thereof, and upon passage of the amended version of H.R. 2670 by the Senate, S.1217 was to be vitiated and indefinitely postponed. *See* 145 Cong. Rec. S9046 (July 22, 1999). The Senate passed its amended version of H.R. 2670 on September 8, 1999, and passage of S. 1217 was subsequently vitiated and indefinitely postponed. *See* 145 Cong. Rec. S10540 (September 8, 1999); 145 Cong. Rec. D949-50 (September 8, 1999). The House version of H.R. 2670, which was passed on August 5, 1999, *see* 145 Cong. Rec. H7383-7384 (August 5, 1999); 1999 House Roll No. 387, did not contain the provision. The two versions of H.R. 2670 went to conference, and the provision was not included in the resultant conference report, *see* 145 Cong. Rec. H10283-01 (Oct. 19, 1999) (H. Rept. 106-398), which was agreed to by both the House and Senate on October 20, 1999, *see* 145 Cong. Rec. D1166 (October 20, 1999). The enrolled bill was presented to the President on October 22, 1999, *see* 145 Cong. Rec. H10768 (October 22, 1999), and vetoed for sundry reasons on October 25, 1999, *see* 145 Cong. Rec. H10835 (October 25, 1999).

CONCLUSION

For the reasons stated above, UC-NC submits that the Petition should be denied.

Respectfully submitted,

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